May 9, 2005

Floor Statements:
Senator Frist
Senator Cornyn

Press Statements:
May 9, 2005
Statement from Susan Irby, communications director for Senator Lott:

"For some time now, Senator Lott and Senator Ben Nelson of Nebraska have been trying to see if there is common ground that could forge a resolution on both sides of the judicial nominations issue. But Senator Lott has not agreed to this deal reported today. In fact, he did not even speak with Senator Nelson last week or this weekend. He has not changed his contention that all judicial nominees should have an up or down vote on the Senate floor."

Noteworthy:
Four-Year Injustice; Priscilla Owen deserves a vote, *National Review*, By Senator John Cornyn, May 9, 2005

They Were Against It, Before They Were For It; The Minneapolis Star Tribune's nuanced position on the filibuster; Scott Johnson, Weekly Standard website, 05/08/2005

Then…
"The truth of the matter is that the leadership of the Senate has a responsibility to do what the Constitution says we should do, which is to advise and at least vote on whether or not to consent to the nomination of nominees for these courts." Senator Carl Levin, Press Conference, September 14, 2000

Now…
"It is more important to protect that right [to filibuster] when it comes to a lifetime appointment than it is even on legislation because you can change legislation but you cannot change a lifetime appointment so this … really a critical issue. We should not rip up the rule book. We should not change the rule by breaking the rule and will count on

moderate Republicans in the Senate who love the Senate, love the traditions in the Senate." ABC's "This Week," May 8, 2005

Senate Majority Leader Bill Frist, M.D.
Judicial Obstruction
Floor Statement
United States Senate
Monday, May 9, 2005

- Four years ago today, President Bush nominated Miguel Estrada to the District of Columbia Circuit Court of Appeals.

- His nomination should have gone smoothly. The American Bar Association pronounced him "highly qualified" – a rating my colleagues on the other side of the aisle once called the "gold standard."

- He clerked for a Supreme Court justice, and worked in both the Bush and Clinton administrations.

- A Honduran immigrant who won top honors at Columbia University and Harvard Law School, Miguel Estrada epitomized the American dream.

- But Miguel Estrada's nomination never received an up or down vote. A minority of Senators used the filibuster to stop the Senate from exercising its Constitutional duty to advise and consent.

- Senators supporting his nomination made seven attempts to bring his nomination to a vote. Each time, the effort failed. Finally, after enduring two years of obstruction, Miguel Estrada withdrew his name from consideration.

- Unfortunately, today marks the fourth anniversary of *another* candidate whose nomination is likewise being blocked. Priscilla Owen, who has served on the Texas Supreme Court for ten years, has earned the praise of Republicans and Democrats alike. Judge Owen won reelection to the Texas bench with 84% of the vote and the endorsement of every major newspaper in the state.

- Former Justice Raul Gonzalez, a Democrat, says: "I found her to be apolitical, extremely bright, diligent in her work, and of the highest integrity. I recommend her for confirmation without reservation."

- And still, a minority of Senators is using the filibuster to stop the Senate from exercising its Constitutional duty to advise and consent – to vote "yes" or "no," up-or-down.

- This campaign of obstruction is unprecedented. Before Miguel Estrada, the Senate had never denied a judicial nominee with majority support an up-or-down vote.

- In the last Congress, the President submitted 34 appeals court nominees to the Senate. Ten of those nominees continue to be blocked.

- Each has been rated "qualified" or "well qualified" by the American Bar Association. Each has the majority support of the Senate. And each would be confirmed if brought to the Senate floor for a vote.

- Meanwhile, the other side threatens to shut down the Senate and obstruct government itself if it doesn't get its way.

- Instead of thoughtful deliberation and debate, a small, partisan minority is attempting to change 225 years of constitutional history.

- Former Senate Majority Leader Bob Dole is correct when he says, that "By creating a new threshold for the confirmation of judicial nominees, the Democratic minority has abandoned the tradition of mutual self restraint that has long allowed the Senate to function."

- Precedent has been replaced with partisanship, and respect for the separation of powers tossed aside.

- And now 12 of the 16 court of appeals vacancies have been officially declared judicial emergencies.

- The Department of Justice tells us that the delays caused by these vacancies are complicating their ability to prosecute criminals. The Department also reports that due to the delay in deciding immigration appeals, it cannot quickly deport illegal aliens who are convicted murderers, rapists, and child molesters.

- Additionally, there are notoriously long delays in deciding habeas petitions, meaning that both victims' families and prisoners often wait years before getting final resolution on murder convictions.

- The obstruction must stop. It is hurting the nominees. It is hurting the Senate. It is hurting the American people.

- For most of the 20th Century, the same party controlled the White House and the Senate. Yet, until the last Congress, no minority ever denied a judicial nominee, with majority support, an up-or-down vote.

- They treated judicial nominees with fairness. And they respected the Senate's role in the appointments process as designed by the Framers.

- Before the recess, I came to the Senate floor to offer a compromise. My proposal is simple. Appeals court judicial nominees should get a fair, open and exhaustive debate. And then they should get an up or down vote.

- Whether on the floor or in committee, it is time for judicial obstruction to end no matter which party controls the White House or the Senate.

- Senate tradition is comprised of shared values based on civility and respect for the Constitution. I sincerely hope that Senate tradition can be restored.

- It is a matter of fairness. It is a matter of honor. It is our Constitutional duty to give these nominees a vote.

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Senator Cornyn
Floor Statement
May 9, 2005
Justice Priscilla Owen Floor Speech

Four years ago today, the President nominated Texas Supreme Court Justice Priscilla Owen to serve on the U.S. Court of Appeals for the Fifth Circuit. Justice Owen is an exceptional jurist, a devoted public servant, and an extraordinary Texan. And yet, after *four years*, she still awaits an up-or-down vote in the United States Senate. **Four years** … and we're still waiting for a vote.

Though a *bipartisan* majority of the Senate stands ready to confirm her nomination last Congress, a *partisan* minority obstructs the process, and refuses to allow a vote on her nomination. What's more, this *partisan* minority now insists – for the first time in history – that she must be supported by a supermajority of 60 Senators, rather than the constitutional standard and Senate tradition of majority vote.

I know Priscilla personally, because we served together on the Texas Supreme Court. She is a distinguished jurist and public servant, who has excelled in virtually everything she has ever done. She was a top graduate from Baylor Law School at the remarkable age of 23, and the top scorer on the Texas bar exam. She entered the legal profession at a time when relatively few women did, and after a distinguished record in private practice, she reached the pinnacle of the Texas bar - a seat on the Texas Supreme Court. She was supported by a larger percentage of Texans than any of her colleagues during her last election, after enjoying the endorsement of every major Texas newspaper. She has been honored as the Baylor Young Lawyer of the Year and Baylor University Outstanding Alumna.

Priscilla Owen enjoys significant *bipartisan* support. Three former Democrat judges on the Texas Supreme Court and a *bipartisan* group of 15 past Presidents of the State Bar of

Texas support her nomination. The Houston Chronicle, on September 24, 2000, called Owen "[c]learly academically gifted," stating that she "has the proper balance of judicial experience, solid legal scholarship and real-world know-how to continue to be an asset on the high court." The Dallas Morning News wrote in support of Owen on September 4, 2002: "She has the brainpower, experience and temperament to serve ably on an appellate court." The Washington Post wrote on July 24, 2002: "She should be confirmed. Justice Owen is indisputably well qualified."

Lori Ploeger, Justice Owen's former law clerk, wrote in a letter to Sen. Patrick Leahy on June 27, 2002: "During my time with her, I developed a deep and abiding respect for her abilities, her work ethic, and, most importantly, her character. Justice Owen is a woman of integrity who has a profound respect for the rule of law and our legal system. She takes her responsibilities seriously and carries them out diligently and earnestly …. Justice Owen is a role model for me and for other women attorneys in Texas."

And Mary O'Reilly, a Life-time Member of the NAACP and a Democrat, in a letter to Sen. Dianne Feinstein dated August 14, 2002, wrote: "I met Justice Owen in January 1995, while working with her on the Supreme Court of Texas Gender Neutral Task Force…. I worked with Justice Owen on Family Law 2000, an important state-wide effort initiated in great part by Justice Owen …. In the almost eight years I have known Justice Owen, she has always been refined, approachable, even-tempered and intellectually honest."

Priscilla Owen is not just intellectually capable and legally talented. She is also a fine human being with a big heart. The depth of her humanity and compassion is revealed through her significant free legal work and community activity.

Priscilla has spent much of her life devoting time and energy in service of her community. She has worked to ensure that all citizens are provided access to justice as the Court's representative on Texas Supreme Court's Mediation Task Force and to statewide committees, as well as in her successful efforts to prompt the Texas Legislature to provide in millions of dollars per year for legal services to the poor.

Priscilla was instrumental in organizing a group known as Family Law 2000, which seeks to find ways to educate parents about the effect that divorce can have on children, and seeks to lessen the negative impacts it has on them. She also teaches Sunday School at St. Barnabas Episcopal Mission in Austin, Texas, where she is an active member.

And so it is plain, from these and so many other examples, that Justice Owen is a fine person and a distinguished leader in the legal community. One would think, Mr. President, that after four long years, she would be afforded the simple justice of an up-or-down vote. I remain optimistic. I remain hopeful that this violation of many years of Senate tradition – the imposition of this new supermajority requirement – will be laid aside in the interest of proceeding with the people's business: A job my colleagues and I are elected to faithfully execute.

And for more than 200 years, it was a job we did indeed execute. Senators from both sides exercised mutual restraint, and did not abuse the privilege of debate out of respect for two co-equal branches of government: the Executive who has a constitutional right to choose his nominees and an independent Judiciary. Indeed, until 4 years ago, colleagues on both sides of the aisle have consistently opposed the use of filibuster to prevent judicial nominees from receiving an up-or-down vote.

Senator Kennedy, on January 28, 1998, stated: "Nominees deserve a vote. If our … colleagues don't like them, vote against them. But don't just sit on them—that is obstruction of justice …"

And Senator Leahy, on June 18, 1998: "I have stated over and over again on this floor that I would refuse to put an anonymous hold on any judge; that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty."

I could not agree more with these comments. We are doing a disservice to this fine nominee in our failure to afford her an up-or-down vote.

The new requirement that this partisan minority is now imposing – that nominees won't be confirmed without the support of 60 Senators – is, by their own admission, wholly unprecedented in Senate history. The reason for this is simple: The case for opposing this fine nominee is so weak that using a double standard and changing the rules is the only way they can defeat her nomination.

What's more, they know it, too. Before her nomination became caught up in partisan, special interest politics, the ranking Democrat on the Judiciary Committee predicted that Owen would be swiftly confirmed. On the day of the announcement of the first group of nominees, including Owen, he said he was "encouraged" and that "I know them well enough that I would assume they'll go through all right." Notwithstanding change of attitude by the *partisan* minority, this gridlock is not really about Priscilla Owen. Indeed, just a few weeks ago, the Democrat Leader announced that Senate Democrats would give Justice Owen an up-or-down vote – albeit only if other nominees were defeated or withdrawn.

Obviously, this debate is not about principle; it is all about politics, and it is shameful. Any fair examination of Justice Owen's record demonstrates how unconvincing the critics arguments are.

For example, Owen is accused of ruling against injured workers, employment discrimination plaintiffs, and other sympathetic parties on a variety of occasions. Nevermind, however, that good judges like Justice Owen do their best to follow the law, regardless of which party will win and which will lose. Nevermind that many of her criticized rulings were unanimous or near-unanimous decisions of the Texas Supreme Court. Nevermind that many of these rulings simply followed federal precedents authored and agreed to even by appointees of Presidents Clinton and Carter, or by other

federal judges unanimously confirmed by the United States Senate. Nevermind that judges often disagree – especially when a law is ambiguous and requires careful and difficult interpretation.

Justice Owen is also criticized for enforcing a popular Texas law generally requiring parental notification before a minor can obtain an abortion. Her opponents allege that, in one parental notification case, then-Justice Alberto Gonzales accused her of "judicial activism."

This charge is untrue. Gonzales did *not* accuse Owen of judicial activism. Not once did he say that "Justice Owen is guilty of judicial activism." To the contrary, Gonzales never even mentioned her name or her opinion in the opinion the critics cite. Furthermore, our current Attorney General has since testified under oath that he never accused Owen of any such thing.

What's more, the author of the parental notification law supports Owen – as does the pro-choice Democrat law professor who was appointed to the Texas Supreme Court's Advisory Committee to implement that law. In her words, Owen simply did – and I quote:
"what good appellate judges do every day. . . . If this is activism, then *any* judicial interpretation of a statute's terms is judicial activism." Mr. President, I'd ask that this letter be entered into the record at the close of my remarks.

The American people know a controversial ruling when they see one. Be it the redefinition of marriage, the expulsion of the Pledge of Allegiance and other expressions of faith from the public square, the elimination of the three-strikes-and-you're out law and other penalties for convicted criminals, or the forced removal of military recruiters from college campuses. Justice Owen's rulings fall nowhere near this category.
There is a world of difference between struggling to interpret the ambiguous expressions of a legislature, and refusing to obey a legislature's directives altogether.

It's clear, then, that Justice Owen deserves the broad bipartisan and enthusiastic support that she obviously enjoys all across the political spectrum. And it's equally clear that her opposition comes only from a narrow band on the far left fringes of the political spectrum.

So, if the Senate were simply to follow over 200 years of consistent Senate and constitutional tradition, dating back to our Founders, there would be no question that she would be confirmed. Legal scholars across the political spectrum have long concluded what we in this body know instinctively – that to change the rules of confirmation as a partisan minority has done, badly politicizes the judiciary and hands over control of the judiciary to special interest groups.

Professor Michael Gerhardt, who advises Senate Democrats about judicial confirmations, has written that a supermajority requirement for confirming judges would be

"problematic, because it creates a presumption against confirmation, shifts the balance of power to the Senate, and enhances the power of the special interests."

D.C. Circuit Judge Harry Edwards, a respected Carter appointee, has written that the Constitution forbids the Senate from imposing a supermajority rule for confirmations. After all, otherwise, "[t]he Senate, acting unilaterally, could thereby increase its own power at the expense of the President" and "essentially take over the appointment process from the President." Edwards thus concluded that "the Framers never intended for Congress to have such unchecked authority to impose supermajority voting requirements that fundamentally change the nature of our democratic processes."

Georgetown law professor Mark Tushnet has written that "[t]he Democrats' filibuster is . . . a repudiation of a settled, pre-constitutional understanding." He has also written: "There's a difference between the use of the filibuster to derail a nomination and the use of other Senate rules--on scheduling, on not having a floor vote without prior committee action, etc.--to do so. All those other rules . . . can be overridden by a majority vote of the Senate . . . whereas the filibuster can't be overridden in that way. A majority of the Senate could ride herd on a rogue Judiciary Committee chair who refused to hold a hearing on some nominee; it can't do so with respect to a filibuster."

And Georgetown law professor Susan Low Bloch has condemned supermajority voting requirements for confirmation, arguing that they would allow the Senate to "upset the carefully crafted rules concerning appointment of both executive officials and judges and to unilaterally limit the power the Constitution gives to the President in the appointment process. This, I believe, would allow the Senate to aggrandize its own role and would unconstitutionally distort the balance of powers established by the Constitution."

She even wrote on March 14, 2005: "Everyone agrees: Senate confirmation requires simply a majority. No one in the Senate or elsewhere disputes that."

In summary, the record is clear. The Senate tradition has always been majority vote, and the desire by some to alter that Senate tradition has been roundly condemned by legal experts across the political spectrum.

And now, all 100 members of this body have a decision to make. Do we accept this dramatic and dangerous departure from two-hundred years of Senate tradition and practice? Or do we work to restore tried-and-true Senate tradition and practice?

The Majority Leader has been hard at work in search of a solution to this problem. And the negotiations continue. Indeed, there has been extensive public and private discussion in recent months about possible responses to this violation of Senate tradition.

Let me be clear: I prefer the bipartisan option over the Byrd option. America works better – the Senate works best -- when things are bipartisan.

I would much prefer to wake up each day and be able to conduct business in a bipartisan manner. I do my best to make the most of every opportunity to do so. I've been working with Senator Leahy on legislation to enhance and expand the accessibility, accountability, and openness of the federal government. I have worked with Senators Feingold and Dodd on continuity of government issues. I have worked with Senator Schumer on ways to combat slavery and human trafficking. I have worked with Senator Kennedy on military citizenship and immigration issues. I would choose collaboration over contention any day of the week.

But bipartisanship is a two-way street. Both sides must agree to certain fundamental principles. And the most fundamental principle is fairness. Fairness means that the same rules and standards apply whether the President is a Republican or a Democrat.

But bipartisanship is difficult when long-held understandings and the willingness to abide by basic agreements and principles have unraveled so badly. Where fairness falters, bipartisanship will fail.

And so I ask my colleagues: What are we to do when these basic principles, commitments, and understandings have been so badly trampled upon?

What are we to do when nominees are attacked for doing their jobs? When they are attacked for following precedents adopted and agreed to by appointees of Presidents Clinton and Carter? When they are singled out for rulings agreed to by a unanimous – or near unanimous court?

What are we to do when nominees are demonized and caricatured beyond recognition? When they are condemned as unqualified – while at the same time they are deemed unanimously well-qualified by organizations Democrats used to revere?

What are we to do when Senate and constitutional traditions are abandoned for the first time in over two centuries? When both sides once agreed nominees should never be blocked by filibuster – and then one side denies the existence of that agreement? When their interpretation of Senate tradition change based on who is in the Oval Office?

What are we to do when our colleagues in one breath boast to their donors of this unprecedented obstruction, then in the next claim precedent is on their side on the Senate floor? When our colleagues justify their obstruction by pointing to Clinton nominees – like their posterchild, Judge Richard Paez – who were confirmed by standards they now reject for our current President's nominees? When our colleagues claim that Justice Owen must cross a threshold of 60 votes, when Judge Paez only needed 51?

What are we to do when the Democrats' former Majority Leader, the Senator from West Virginia, claims on one day that the filibuster is sacrosanct and sacred to the Founders, then demonstrates by his own words how he has killed the filibuster in the past? Here on the Senate floor, on January 4, 1995, he stated: "I have seen filibusters. I have helped to break them …. the filibuster was broken – back, neck, legs, arms."

And finally, what are we to do when they claim on one day that all they seek is more time to debate a nomination, then claim on another day that there aren't enough hours in the universe to debate the nomination?

It is time to fix our broken judicial confirmation process. It is time to end the blame game, fix this problem, and move on. It is time to end the wasteful and unnecessary delay in the process of selecting judges that hurts our justice system and harms all Americans.

It is intolerable that a *partisan*, willful minority will not allow the *bipartisan* majority to conduct the nation's business. It is intolerable that the standards now change depending on who occupies the White House and which party is the majority party in the Senate. And it is intolerable that this nominee has waited four long years for an up-or-down vote.

We need a fair process for selecting fair judges - with full investigation, full questioning, full debate, and then a vote.

Throughout our nation's more than 200-year history, the constitutional rule and Senate tradition for confirming judges has been majority vote – and that tradition must be restored. After four years of delay, giving Justice Priscilla Owen an up-or-down vote would be an excellent start.

Thank you, Mr. President. I yield the floor.

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They Were Against It, Before They Were For It
The Minneapolis Star Tribune's nuanced position on the filibuster
Scott Johnson
05/08/2005

Speaking out of both sides of one's mouth is an occupational hazard, if not an occupational necessity, for politicians seeking elective office in competitive races. It's not a pretty sight, and it supports a cynicism about democratic politics that is unbecoming. Catering to such cynicism, the leftist writer Garry Wills used to advise college audiences, "Vote for your enemy--he has no one to sell out to but you."

The political debate over the use of the Senate's filibuster rule to torpedo President Bush's judicial nominees has triggered a series of reversals and pratfalls that support the low-comedy version of democratic politics. Among the most notable examples was the April 3 profile of former Ku Klux Klan kleagle and civil rights obstructionist Robert Byrd as a cornpone constitutionalist by New York Times congressional reporter Sheryl Gay Stolberg: "Master of Senate's Ways Still Parries in His Twilight." Twilight zone would be more like it, but we get the point.

In my home state of Minnesota the pratfalls have reached a kind of perfection in the naked reversals of the laughingstock-liberal *Minneapolis Star Tribune* and respected liberal former Minnesota Senator Walter Mondale. During the Clinton administration, no newspaper in the country converted Democratic party talking points into editorials more quickly than the *Star Tribune*. The tradition continues today. In an April 24 editorial, the *Star Tribune* lauded the filibuster and condemned Republican efforts to end it in connection with judicial nominations.

When portions of President Clinton's legislative program were threatened by the filibuster in 1993, however, the story was different. The *Star Tribune*'s editorial page raged: "Down the drain goes President Clinton's economic stimulus package, washed away in the putrid flood of verbiage known as a filibuster. Call it a power game. Call it politics as usual. Call it reprehensible." (Call it an occasion for the enforcers on the *Star Tribune*'s editorial board to opine in their characteristic bullying style.)

Well, that was different, of course. It was different, too, in 1994, when the *Star Tribune* published an editorial titled "Stall busters--Don't pull punches in anti-filibuster fight." This time, the *Star Tribune* hailed the efforts of a bipartisan group that sought to end the filibuster once and for all:

More than a score of distinguished Minnesotans are lending their names today to a national crusade against a worsening threat to American democracy. The threat doesn't spring from economic ills, social decay or foreign menace. It's something that's long been in the U.S. Senate's rule book--the ability of a 41-percent minority to block action with a filibuster . . . [W]hen such a group comes together with like-minded leaders from around the country, they should not be content merely to sound an alarm and seek some pledges. They should crusade for changes in Senate procedures that would prevent an obstructionist minority from delaying action indefinitely.

When we noted the *Star Tribune*'s "that was then, this is now" approach to editorial judgment on *Power Line*, Jim Boyd--the deputy editor of the *Star Tribune* editorial page--irately denied any contradiction. Two days later, however, he wrote us: "I think you actually have caught us in a contradiction. We can change our mind . . . but in this case, we really didn't. We simply missed the precedent and, like a court, if we make such a shift, we owe readers an explanation for why we did it."

We're still waiting; the *Star Tribune* has yet to publish the explanation it acknowledges its readers are owed. But it *has* published another column condemning Republican efforts to roll back the filibuster in connection with judicial nominations. Last week the *Star Tribune* scraped bottom in a purported bipartisan column under the joint byline of Republican former Senator David Durenberger and Democratic party elder statesman Walter Mondale: "Preserve Senate rules, filibuster and all." (For present purposes, I'll ignore Durenberger except to say that when last seen in the *Star Tribune*, he endorsed John Kerry for president; that's bipartisanship a la the *Star Tribune*.)

Last week's column traces the venerable filibuster to "the days when Thomas Jefferson first wrote the Senate's rules," and argues: "Today, as it has been for 200 years, an individual senator may talk without limit on an issue; and others may join in, and they may continue to press those issues until or unless the Senate by 60 votes ends that debate and a vote occurs. No other legislative body has such a rule."

The imputation of an ancient lineage to a 60-vote filibuster rule is of course flatly mistaken. The 60-vote rule derives not from the days when "Thomas Jefferson first wrote the Senate's rules," but rather from 1975. Surely Mondale remembers; as a Minnesota Senator, he led the successful fight to reform the filibuster by reducing the number of votes necessary for cloture from 67 to 60. Mondale was, in fact, the leading Democratic opponent of the filibuster. On January 17, 1975, he stated on the floor of the Senate: "It seems to me that a not-so-subtle difference, a profound difference, between 66 2/3 percent and a simple majority could be the difference between an active, responsible U.S. Senate and one which is dominated by a small minority." Mondale accordingly advocated the right of a Senate majority to change the filibuster rule: "May a majority of the members of the Senate of the 94th Congress change the rules of the Senate, uninhibited by the past rules of the Senate? I firmly believe that the majority has such a right--as the U.S. Constitution, the precedents of this body, the inherent nature of our constitutional system, and the rulings of two previous vice presidents make clear."

In last week's *Star Tribune* column, Mondale acknowledged neither his past positions, nor his own historic role in reforming the filibuster in 1975. Like a good postmodern Democrat, Mondale simply put his past under erasure. Interested readers can turn for further details to the law review article on the constitutional option by Martin Gold and Dimple Gupta. The Gold-Gupta article covers the Senate's 1975 proceedings as but one chapter of an important story.

After adoption of the revised filibuster rule in 1975, Mondale took a look back in a March 18 column ("The filibuster fight") for the *Washington Post*. That column deserves the attention of serious observers of the current filibuster debate. Mondale proudly wrote: "The modification of Rule XXII [the filibuster rule] may prove to be one of the most significant institutional changes in the 196 years of the Senate." Mondale added: "[T]he Rule XXII experience was significant because for the first time in history a Vice President and a clear majority of the Senate established that the Senate may, at the beginning of a new Congress and unencumbered by the rules of previous Senates, adopt its own rules by majority vote as a constitutional right."

It's a shame Mondale has chosen to ignore his own words; some might consider them inspirational.

Scott Johnson is a contributor to the blog Power Line *and a contributing writer to The Daily Standard*

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Four-Year Injustice
Priscilla Owen deserves a vote.

NATIONAL REVIEW
By Senator John Cornyn
May 9, 2005

Four years ago today, President George W. Bush nominated Priscilla Owen to serve on the federal court of appeals. Justice Owen is an extraordinary Texan, an exceptional jurist, and a devoted public servant. Yet, after four years, she is still waiting for an up-or-down vote in the United States Senate. What's more, a partisan minority of senators now demands — for the first time in history — that she must be supported by a supermajority of 60 senators, rather than the constitutional rule and Senate tradition of majority vote. After four years, it is long past time to restore sanity and Senate tradition to our judicial confirmation process.

I know Priscilla personally, because we served together on the Texas supreme court. Throughout her life, she has excelled in virtually everything she has ever done. She was a law-review editor, a top graduate from Baylor Law School at the remarkable age of 23, and the top scorer on the Texas bar exam. She entered the legal profession at a time when relatively few women did, and after a distinguished record in private practice, she reached the pinnacle of the Texas bar — a seat on the Texas supreme court. She was supported by a larger percentage of Texans than any of her colleagues during her last election, after enjoying the endorsement of every major Texas newspaper.

Unsurprisingly, then, the American Bar Association, after careful study, unanimously rated her well qualified to serve on the federal bench — their highest rating.

Unsurprisingly, she enjoys the enthusiastic support of a bipartisan majority of senators.

Yet a partisan minority of senators now insists that Owen may not be confirmed without the support of a supermajority of 60 senators — a demand that is, by their own admission, wholly unprecedented in Senate history. Why? Simple: The case for opposing her is so weak that changing the rules is the only way they can defeat her nomination.

What's more, they know it, too. Before her nomination became caught up in partisan special-interest politics, the top Democrat on the Judiciary Committee predicted that Owen would be swiftly confirmed. On the day of the announcement of the first group of nominees, including Owen, he said he was "encouraged" and that "I know them well enough that I would assume they'll go through all right." Indeed, just a few weeks ago, the Minority Leader announced that Senate Democrats would give Justice Owen an up-or-down vote — albeit only if Republicans agreed to deny the same courtesy to other nominees.

These concessions are understandable, because the case against Owen is unconvincing. For example, Owen is accused of ruling against injured workers, employment discrimination plaintiffs, and other sympathetic parties on a variety of occasions. Never mind, however, that good judges like Justice Owen do their best to follow the law, regardless of which party will win and which will lose. Never mind that many of her criticized rulings were unanimous or near-unanimous decisions of the Texas Supreme Court. Never mind that many of these rulings simply followed federal precedents authored and agreed to even by appointees of Presidents Clinton and Carter, or by other federal judges unanimously confirmed by the United States Senate. Never mind that judges often disagree — especially when a law is ambiguous and requires careful and difficult interpretation.

Justice Owen is also criticized for enforcing a popular Texas law generally requiring parental notification before a minor can obtain an abortion. Her opponents allege that, in one parental-notification case, then-Justice Alberto Gonzales accused her of "judicial activism."

This charge is unpersuasive for at least two reasons. First, judges disagree all the time — that's why we have multi-member courts. U.S. Supreme Court Justice John Paul Stevens once accused Justice Byron White of "judicial activism," while in another opinion he accused Justice Lewis Powell and Sandra Day O'Connor of "judicial activism."

But second, and more importantly, Gonzales did not accuse Owen of judicial activism. Not once did he say that "Justice Owen is guilty of judicial activism." To the contrary, Gonzales never even mentioned her ruling. And he has since testified under oath that he never accused Owen of any such thing. What's more, the author of the parental notification law supports Owen — as does the pro-choice Democrat law professor who was appointed to the Texas supreme court's Advisory Committee to implement that law. In her words, Owen simply "did what good appellate judges do every day. . . . If this is activism, then any judicial interpretation of a statute's terms is judicial activism."

The American people know a controversial ruling when they see one — whether it's the redefinition of marriage, or the expulsion of the Pledge of Allegiance and other expressions of faith from the public square — whether it's the elimination of the three-strikes-and-you're out law and other penalties against convicted criminals, or the forced removal of military recruiters from college campuses. Owen's rulings fall nowhere near this category of cases. There is a world of difference between struggling to interpret the ambiguous expressions of a legislature, and refusing to obey a legislature's directives altogether.

The Senate judicial confirmation process has been at times emotional and politically divisive, and that is unfortunate. But all Americans of good faith should at least agree that we need a fair process for selecting judges — with full investigation, full questioning, full debate, and then an up-or-down vote. And all Americans should agree that, although nobody likes to lose, the rules should always be the same, regardless of whether the president is Republican or Democrat. Throughout our nation's more than 200-year history, the constitutional rule and Senate tradition for confirming judges has been majority vote. senators should uphold and restore that tradition — and giving Owen an up-or-down vote, after four years of delay, would be an excellent start.

— The Honorable John Cornyn is an U.S. senator from Texas and a member of the Senate Judiciary Committee. He served previously as Texas attorney general and state supreme court justice.